

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION I

CA 06-407

LISA HENDRIX

NOVEMBER 8, 2006

APPELLANT

V.

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[NO. F304388, F304389]

BOB'S CUSTOM CABINET, INC. and
SECOND INJURY FUND

APPELLEES

AFFIRMED

Appellant Lisa Hendrix brought a workers' compensation claim against appellee Bob's Custom Cabinets, Inc., alleging that she sustained a lower back injury during a work-related accident on either August 15, 2002, or September 14, 2002. After a hearing, the Workers' Compensation Commission denied compensability on the basis that Ms. Hendrix failed to prove a causal relationship between any employment-related incident and her back problems. Ms. Hendrix now appeals, arguing that the Commission's decision is not supported by substantial evidence. We affirm.

A "compensable injury" is one "arising out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(I) (Repl. 2002). As the claimant, the appellant had the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code

Ann. § 11-9-102(4)(E)(I) (Repl. 2002). Thus, in order to prove a compensable injury, the claimant must prove a causal relationship between her employment and the injury. *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 72 S.W.3d 889 (2002).

When a workers' compensation claim is denied, the substantial evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for the denial of relief. *Williams v. L&W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004). In determining the sufficiency of the evidence to sustain the findings of the Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Stiger v. State Line Tire Serv.*, 72 Ark. App. 250, 35 S.W.3d 335 (2000). In making our review, we recognize that it is the Commission's function to determine the credibility of witnesses and the weight to be given their testimony. *Williams, supra.*

At the hearing, Ms. Hendrix testified that she is thirty-four years old and began working for Bob's Custom Cabinets on July 24, 2001. She stated that her duties included

building drawers and installing cabinets. Ms. Hendrix's husband, Robert Hendrix, was the foreman, and Ms. Hendrix stated, "I worked just like a man and was expected to do the same work."

Ms. Hendrix described an event that occurred in August 2002, when appellee's owner Joe Gilbert sent her and another employee to a particular location to perform some work.

Ms. Hendrix testified:

I was bent down in a crouching position when Cliff went outside to flip out his cigarette butt. His opening the outside door caused an inside door leaning against the door frame to fall on top of my head, pinning my head between that steel door and the top of the cabinet door. It knocked my hat off and pulled my earrings out of my ears. I screamed and lost consciousness for a few seconds. The back of my head and my neck hurt the rest of the day. I did not fill out accident reports because they were difficult to get from Joe. We had no official accident forms. I didn't miss one day of work over it.

Ms. Hendrix gave the following testimony about a subsequent event in September 2002:

In September, Joe asked us to work on Saturday to install a 12-foot maple kitchen cabinet island. The wood for the cabinet would have weighed anywhere between 600 and 1000 pounds. Chris Nagy and another associate loaded it onto the trailer. Louis and I unloaded it from the trailer. Louis dropped his end of it and I jerked and twisted. It felt like a real sharp jerked muscle. I kind of rested up and kept rubbing my back. Robert knew and Joe was right there in the kitchen with us. I went home and was miserable for the rest of the night. I did not feel great but I showed up for work Monday.

Ms. Hendrix testified that she informed Mr. Gilbert of both incidents and told him several times that her back was hurting. She stated that she twice asked him for workers' compensation forms, but that "he kept putting me off." Ms. Hendrix continued to work and did not seek any medical treatment until January 2, 2003, when she called and made an

appointment for January 14, 2003, at the Northwest Medical Clinic. However, she maintained that she hurt every day, thought that she might heal without treatment, and did not want to spend any money on medical care until after her children were taken care of for the holidays. Ms. Hendrix stated that after her accidents, "I was on lighter duty because my husband, Robert, was the foreman and he covered for me." She stated that she had never had any sharp pains in her back prior to the September 2002 incident.

Appellant's husband testified that, over the course of four months after the September 2002 incident, Ms. Hendrix was crying a lot and hurting, and that she was not doing any lifting at work. Mr. Hendrix stated that he tried to get forms from Mr. Gilbert to file a workers' compensation claim, but that "Joe told me that he would take care of it."

Dr. Cyril Raben, an orthopaedic surgeon, first saw Ms. Hendrix upon referral on February 28, 2003. Dr. Raben's first clinic note indicated that Ms. Hendrix's complaints began six or seven months ago. Dr. Raben testified that Ms. Hendrix told him that she either pulled a muscle lifting cabinets or hurt herself while unloading firewood for her employer.

At the direction of Dr. Raben, an MRI was performed on March 5, 2003. The MRI revealed a herniated disc at L5-S1 as well as severe disc-space narrowing, disc dessication, and degenerative changes. Dr. Raben performed fusion surgery on November 12, 2003, and thereafter assigned a permanent impairment rating of between eight and twelve percent. As a result of her back condition, Ms. Hendrix has not worked since August 21, 2003.

Dr. Raben gave the opinion that Ms. Hendrix's back condition was work-related. He indicated as much in his medical reports and in his testimony. Dr. Raben testified that either of the alleged incidents in August or September 2002 could have caused the injury. He explained that this time frame was probable because the drying of the disc space in a young woman would have likely occurred four to six months prior to the MRI scan. Dr. Raben described Ms. Hendrix as a tough individual who was hurt on the job but downplayed her symptoms for several months prior to seeking medical attention. Dr. Raben could not point to a particular incident that caused the back injury, but stated that, among the events related to him by Ms. Hendrix, "whichever one of those was the heaviest gets my vote." He further stated, "I would pick whichever one was the most trauma...whichever one caused the most acute compression across the lumbar spine."

On appeal, Ms. Hendrix argues that the Commission erred in finding her back condition to be noncompensable, asserting that all of the relevant medical evidence indicates otherwise. Ms. Hendrix relies primarily on the opinion of her surgeon, Dr. Raben. She notes that there was no medical opinion to refute Dr. Raben's opinion that this was a work-related injury.

Ms. Hendrix further claims that her testimony and the testimony of her husband established that she sustained a work-related back injury. While she did not seek medical attention or file a claim for a period of several months following the accidents, she asserts that she did give notice of the accidents to her employer and that she never returned to full

duty as a result of her back problems. Ms. Hendrix argues that “the appellee’s attorney chose not to present his owner-employer as a witness, presumably because his testimony would have been adverse to the appellee carrier’s case, and there is a legally rebuttable presumption to that effect[.]” Ms. Hendrix contends that there was a close temporal relationship between her work-related accidents and subsequent medical treatment, and that there was no evidence of any injuries other than those that occurred at work. Under such circumstances Ms. Hendrix argues that reasonable minds could not have reached the Commission’s conclusion, and thus that the decision of the Commission must be reversed.

There were numerous inconsistencies in the evidence as to whether Ms. Hendrix suffered a compensable injury, and we hold that the Commission’s opinion displays a substantial basis for the denial of relief. In her own testimony, Ms. Hendrix stated, “After we talked to Dr. Raben, my husband and I sat down and tried to pick a date as to when this might have happened,” and that, “We hadn’t really sat down and really thought about what incident could have caused this.” In her husband’s testimony, he stated, “We didn’t have any idea whether the back problems were related to the work injury.” While Dr. Raben thought the injury was compensable, his opinion relied on the history given by Ms. Hendrix.

The medical documentation was fraught with inconsistencies as to the origin of Ms. Hendrix’s back condition. The initial report dated January 14, 2003, documented lower back pain that began six to eight weeks ago, which would have been several weeks after the alleged incidents in August and September of 2002. The same report states, “Does not

remember a specific injury but does lift at work.” In a medical report dated February 24, 2003, Dr. Orlando Aguilar-Guzman reported that the patient “gives a couple of month history of low back pain.” In Dr. Raben’s initial report on February 28, 2003, there is no mention of any specific incident, but states, “She has sustained multiple lifting/twisting injuries over time.”

A further indication of the uncertainty surrounding the claim is found in a March 14, 2003, report where Dr. Raben states, “Ms. Hendrix’s question was whether or not this could be job related.” Indeed, in a “patient information” form filled out by Ms. Hendrix before her first visit with Dr. Raben, she was asked whether this was related to a workers’ compensation accident, and instead of circling “yes” Ms. Hendrix wrote “depends on outcome of 1st visit.” Ms. Hendrix did not file a claim for compensation until April 10, 2003, and in a subsequent notice filed May 27, 2003, she identified only the August 15, 2002, injury, while later testifying that that incident did not cause any problems with her low back and that those problems did not arise until after the September 14, 2002, incident. Finally, there was a March 18, 2003, report by a nurse practitioner indicating that the nurse advised Ms. Hendrix that she could not go back and change the documentation showing that no specific injury had been initially reported, and that after this conversation Ms. Hendrix left very disgruntled.

The Commission also had before it the evidence that Ms. Hendrix continued to work for several months after the alleged work-related incidents, and that she failed to file for

benefits until months after her first doctor visit. Moreover, despite her testimony to the contrary, there was documentation showing that Ms. Hendrix had had back problems prior to her employment with the appellees, and that some of her problems were in the L5-S1 region. While Ms. Hendrix argues in her brief that there is a presumption that the appellee's owner's testimony would have been adverse to the appellee had he been called as a witness, we know of no such presumption and Ms. Hendrix has failed to support this assertion with any convincing argument or citation to authority. The Commission evidently chose not to credit Ms. Hendrix's testimony, and we are bound by that determination. We affirm the Commission's conclusion that appellant failed to meet her burden of proving a compensable injury by the preponderance of the evidence.

Affirmed.

NEAL and CRABTREE, JJ., agree.